ter had made the reference. We do not think that the Industrial Court's jurisdiction to determine the earlier dispute extended to the determination of the later dispute which is a dispute between different parties.

It appears that the true position in this case is as follows. The hotel by mistake paid to other employees Jamilah's share of the service charge in respect of the period when she did not work, *i.e.* before her reinstatement. The hotel was under the mistaken belief that she was not entitled to it. After Award No. 82/1982 was made, the hotel realizes that it has to pay her share of the service charge in arrears, but it believes that it can recover from the other employees what it had paid them by mistake. Therefore it contends that it can pay Jamilah her arrears of service charge out of the service charge received from the customers after her reinstatement, so that the other employees would now receive their shares of the service charge less the amount which had mistakenly been paid to them. The order contained in Award No. 82/1982 for the payment to Jamilah of her arrears of service charge is directed to the hotel. Therefore the hotel has to pay the arrears, and it has to pay out of its own fund in the first instance, and then if it is confident that it is entitled to recover from the other employees what had been paid to them by mistake, it can bring a court action to recover, and the court which has the jurisdiction to entertain such action is the civil court. In other words, whether the hotel can recover from the other employees what has been paid to them by mistake is a matter which does not concern the Industrial Court in this particular reference. Whatever may be the outcome of that dispute should not deny Jamilah from being paid immediately her dues under Award No. 82/1982 consequent to her wrongful constructive dismissal.

The appeal is allowed with costs here and in the High Court. Award No. 319/1986 is quashed. Deposit to be refunded to the union. We further order that the hotel should pay to Jamilah within one month from today what she is entitled to under Award No. 82/1982.

Appeal allowed.

Solicitors: *Skrine & Co.; Shook Lin & Bok.*

DERRICK GREGORY v. PUBLIC PROSECUTOR

[S.C. (Abdul Hamid C.J. (Malaya), Hashim Yeop A. Sani & Syed Agil Barakah S.C.JJ.) 18 & 19 April 1988]

[Kuala Lumpur – Supreme Court Criminal Appeal No. 12 of 1987]

Criminal Law – Charge of trafficking in drugs – Defence of duress – Evidence of state of mind of accused – Expert evidence – Sentence – Dangerous Drugs Act 1952, s. 39(B)(2) – Penal Code (F.M.S. Cap. 45), s. 94.

In this case, the appellant had been charged with trafficking in dangerous drugs. At the trial, the defence did not challenge the evidence of the prosecution but relied on the defence of duress. The learned trial judge rejected the defence of duress and convicted the appellant and sentenced him to death. The appellant appealed.

Held, dismissing the appeal: (1) the law clearly envisages that to constitute threats causing the apprehension that instant death to that person will be the consequence, there must be reasonable fear. Persons who do criminal acts from fear of anything but instant death do them at their peril;

(2) there was no misdirection in law as the learned judge fully appreciated what is required in law to constitute a valid defence of duress. The learned judge correctly conceived that each case would depend on the facts and surrounding circumstances of that particular case. He found that there was no evidence to suggest that duress was present or continued when the accused was arrested;

(3) the learned judge in this case held that he could not find any evidence sufficient to cast a reasonable doubt on the prosecution's case. The court agreed with the trial judge that the defence of duress could not stand and the conviction must be upheld. As to sentence, the learned judge had exercised his discretion judicially and it was not right for the court to interfere.

Case referred to:

(1) *Tan Seng Ann* v. *Public Prosecutor* [1949] M.L.J. 87 (refd).

SUPREME COURT.

R. Rajasingam for the appellant.

Josephine Navaratnam (Miss) (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Abdul Hamid C.J. (Malaya) (delivering the judgment of the court): The appellant was apprehended at the Bayan Lepas Airport, Penang with seven packets of heroin in his left boot and seven packets of heroin in his right boot and another four packets of heroin in his underwear. He was tried in the High Court, Penang and was convicted under section 39(B)(2) of the Dangerous Drugs

Act 1952. The appellant did not give evidence in the witness box but instead gave a statement from the dock and relied on the evidence of two medical doctors (Dr. Colin Brewer (DW 2) and Dr. Mahadevan (DW 3)) on the state of mind of the appellant. Evidence in rebuttal was brought by the prosecution in the form of one Dr. M. Subramaniam (PW 12).

The learned judge noted that the two defence medical consultants had a two-hour interview with the appellant in the Penang Prison after which they prepared a general report. The gist of their findings was that the appellant suffered from a serious personality disorder secondary to organic brain disease. The learned judge, on the other hand, said that he was satisfied that Dr. Subramaniam had thoroughly examined and observed the appellant in the Hospital Bahagia for a period of three months and his examination consisted of personal interviews and full psychiatric examination to search for any evidence of mental disorder as well as any abnormalities in the accused's personality structure. Dr. Subramaniam came to the conclusion that the appellant did not suffer from any brain injury but only from a personality disorder.

The learned judge concluded that there was no real basis for the defence witnesses to come to their conclusion that he suffered from a serious personality disorder secondary to organic brain disease.

At the conclusion of the trial, counsel for the appellant, Mr. Rajasingam, submitted that the defence did not challenge the evidence of the prosecution but stated that section 94 of the Penal Code applied in this case and that the appellant was under duress from the appellant's accomplices.

It is the crux of the appellant's submission that the appellant committed no offence as he was compelled to do it by threats, in other words, under duress. Section 94 of the law clearly states that except for murder and offences included in Chapter VI punishable with death, nothing is an offence which is done by a person who is compelled to do it by threats, which, at the time of doing it, reasonably cause the apprehension that instant death to that person will otherwise be the consequence.

The law clearly envisages that to constitute threats causing the apprehension that instant death to that person will be the consequence, there must be reasonable fear. Persons who do criminal acts from fear of anything but instant death do them at their peril.

Mr. Rajasingam, counsel for the appellant, submitted that the learned trial judge erred in law when he misdirected himself in his reading of section 94. The learned judge stated in his judgment:

> "It is clear to me that to invoke section 94 there must be reasonable fear of instant death at the very time of the commission of the offence. If the offence is completed when all danger of instant death has been removed the person committing the offence is not protected under this section. Further, if the accused on his own accord placed himself in a situation by which he became subject to the threat of any person or persons, whatever threat may have been used towards him, the provisions of the section do not apply. In *Tan Seng Ann* v. *Public Prosecutor*[1] Willan C.J. held that duress to be pleaded successfully must be imminent, extreme and persistent."

He went on to say that "each case of course depends on the facts and surrounding circumstances. In the present case, I could not find an iota of evidence to suggest that duress was present or continued when the accused was arrested by PW 1 at the Bayan Lepas Airport on 7 October 1982."

It may well be that that part of the judgment had not been happily worded, nonetheless it is abundantly clear that the learned judge was very careful and fully appreciated what is required in law to constitute a valid defence of duress. There was, in our view, no misdirection in law; indeed the learned judge correctly conceived that each case would depend on the facts and surrounding circumstances of that particular case. In the instant case, he could not find any evidence sufficient to cast a reasonable doubt on the prosecution's case.

The appellant made a statement from the dock and his cautioned statement was before the court. The learned judge did consider it for obviously he would not have held that the appellant failed to raise any reasonable doubt on the prosecution's case. After considering the defence, the learned judge rejected it because he not only disbelieved him but found no evidence to cast that reasonable doubt on the prosecution case.

We therefore agree with the judge that the defence of duress cannot stand and accordingly uphold the conviction.

It was also submitted by Mr. Rajasingam that the judge should have exercised his discretion by passing a life instead of a death sentence since the offence was committed before the mandatory death penalty was imposed by law.

Looking at his grounds of decision, we find that the judge has exercised his discretion judicially and we do not think it is right for us to interfere. Accordingly, we also confirm the sentence imposed by the learned judge.

Appeal dismissed.

Solicitors: *Rajasingam & Co.*

M. RATNAVALE v. S. LOURDENADIN
M. MAHADEVAN v. S. LOURDENADIN

[S.C. (Abdul Hamid C.J. (Malaya), Hashim Yeop A. Sani & Syed Agil Barakbah S.C.JJ.) 21 & 25 April & 4 June 1988]

[Kuala Lumpur – Supreme Court Civil Appeal Nos. 294 and 275 of 1985]

Land Law – Contract for sale of land – Repudiation of contract – Whether valid – Claim of specific performance – Defence of laches – Delay in prosecuting claims – Delay in lodging caveat on the land – Whether allegations of fraud or misrepresentation had been proved – Fraud not proved beyond reasonable doubt – Plaintiff calling defendant as witness – National Land Code 1965, s. 340(2)(a).

Civil Procedure – Trial – Plaintiff calling defendant as a witness – Discretion of court.

The first appellant, M. Ratnavale, was the registered proprietor of a piece of land in Kuala Lumpur. The first appellant and the respondent entered into an agreement for the sale and purchase of the land at the price of $93,000 free from all encumbrances. It was provided in the agreement that the sale of land shall be subject to the vendor obtaining a valid and registrable discharge of the charge of the land, which had been charged to one K. Sinnathamby, since deceased, and also subject to the Ruler-in-Council granting to the purchaser an extension of time to erect a building on the land. There was a delay in the completion of the sale and eventually the first appellant terminated the agreement and entered into a sale and purchase agreement of the land with the second appellant, Dr. M. Mahadevan, who was one of the executors of the estate of the first appellant's husband, who had died in the meanwhile. The second appellant was registered as the proprietor of the land.

The respondent, as plaintiff in the court below, alleged conspiracy to defraud both against the first and second appellants. The gist of the particulars of the statement of claim were summarized as follows:

(a) falsely and fraudulently representing to the Registrar of Titles that the issue document of title was lost, thereby *inducing the Registrar to issue a continuation title*;

(b) falsely and fraudulently representing to the Registrar that the personal representatives of the estate of the chargee could not be located, thereby *inducing the Registrar to cancel the memorial relating to the said charge* on the registry document of title and thereafter to discharge the said charge on 5 December 1973;

(c) falsely and fraudulently representing to the Registrar that the issue document of title was lost, thereby *inducing him to dispense with the production of the said title when registering the transfer* from Ratnavale to Mahadevan on 13 March 1974;

(d) presenting the transfer from Ratnavale to Mahadevan for registration on 13 March 1974 with the intention to defraud Lourdenadin, such presentation being *made after they acquired knowledge that the Ruler-in-Council had extended the time for construction on the land*;

The learned trial judge summarized the issues before her on the merits as follows:

(i) whether the repudiation by the first appellant of the contract was valid;

(ii) if it was not valid, whether specific performance should be granted to the respondent;

(iii) whether defence of laches applied to prevent the granting of specific performance;

(iv) whether the allegation of fraud or misrepresentation have been proved; and

(v) what are the proper reliefs to be granted in the event the plaintiff succeeds against both defendants.

Held: (1) the repudiation of the contract by the first appellant was contrary to the terms she had agreed to. The learned judge was therefore correct in holding that the purported termination of the first agreement by the first appellant was bad;

(2) under the circumstances, the case is not a fit and proper one for the grant of specific performance. The respondent in fact agreed to vary the terms of the first agreement but the variations never took effect because they were not acceptable to the first appellant. The respondent had not shown reasonable diligence in prosecuting her claims. There was the unexplained delay of 14 months in instituting proceedings after her interest was threatened and a further unexplained delay of five years before lodging a caveat on the land to protect her interest. The delay in instituting proceedings against the second appellant was even worse;

(3) the court was not satisfied that fraud under section 340(2)(a) of the National Land Code has been proved beyond reasonable doubt by reference to any of the particulars set out in the amended statement of claim. Suspi-